IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

CMA.No. 52 of 1999()

AS.52/1996 of SUB COURT, HOSDRUG
OS.129/1994 of MUNSIFF COURT, HOSDRUG

.....

APPELLANTS IN CMA/RESPONDENTS 1 TO 7 IN A.S./PLAINTIFFS IN THE SUIT:

---

1. PADMAVATHI, W/O.DAMODARA, RESIDING AT NEAR PANCHALINGESHWARA TEMPLE, URVA, MANGALORE 6.

2. KRISHNAVENI, D/O.-DO- AND W/O.PRABHAKARA, RESIDING AT SREE MUKAMBIKA HOUSE, KODIKKAL, MANGALORE.

3. HEERA, D/O. -DO- RESIDING NEAR PANCHALINGESHWARA TEMPLE, URVA, MANGALORE 6.

4. SHASHIKALA, D/O.-DO- IN -DO- -DO-

5. SHOBHA, -DO- -DO-

6. NALINI, -DO- -DO-

7. GANESH RAO, S/O.-DO- -DO-

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.) &
SHRI P.B.KRISHNAN

RESPONDENTS 1 TO 19 IN CMA/RESPONDENTS 8 TO 25 AND APPELLANT IN A.S./DEFENDANTS 1 TO 18 AND 19 IN SUIT:

---

1. LALITHAMMA, D/O.RAMAKRISHNA, RESIDING AT R.R.SADAN, NEAR DURGA HIGH SCHOOL, HOSDRUG VILLAGE.

(*)2. AMBA BAI, D/O.-DO- & W/O.KORAGAPPA, RESIDING AT SREE MUKAMBIKA HOUSE, KODIKAL, ,MANGALORE. (DIED. LRS IMPLEADED)

3. BHAGEERATHI D/O. -DO- & W/O.B.BABU RAO, RESIDING OPPOSITE TO RAMAKRISHNA ASHRAM, NEAR MANGALAR DEVI TEMPLE, MANGALORE.

(**)4. VITTALA, S/O.-DO- RESIDING AT R.K.SADAN, NEAR DURGA HIGH SCHOOL, HOSDRUG TALUK, KANHANGAD.(DIED. LRS IMPLEADED)

5. KALAVATHI, W/O.VINAYAKA, RESIDING AT SHESHU POOJARI COMPOUND, HOYIGE BAZAR, MANGALORE.

(***)6. VARIJA, D/O.-DO- & W/O.K.G.NAMADEVA, RESIDING AT SIDHARTHACHAL, KACHUPAD POST, SAKANIKA, BOMBAY 72.(DIED. LRS IMPLEADED)

7. JAGADEESH, S/O. -DO-, RESIDING AT SESHU POOJARY COMPOUND, HOYIGE BAZAR, MANGALORE.

8. UMESH, S/O.-DO- IN -DO- -DO-

9. HAREESH, --DO- -DO-

10. PREMALATHA, W/O.PRATAP, STENOGRAPHER, SOCIAL WELFARE AND LABOUR DEPARTMENT, 3RD STAGE, II FLOOR, M.S.BUILDING, BANGALORE.

11. TRIVENI, D/O.VINAYAKA & RESIDING AT SESHU POOJARY COMPOUND HOYIGE BAZAR, MANGALORE.

12. SEETHA BAI, W/O.NARAYANA, RESIDING AT DOOR NO.40/6, 7TH CROSS, 3RD MAIN, CAMBRIDGE LAY OUT, ALSOOR POST, BANGALORE 8

13. BHARATHI, W/O.HARICHANDRA HEDGE, PRIMARY HEALTH CENTRE, POST BELTHANGADY.

14. PURANDHAR, S/O.NARAYANA, RESIDING AT DOOR NO.40/6, 7TH CROSS, 3RD MAIN, CAMBRIDGE LAY OUT, ALSOOR POST, BANGALORE 8

15. SHARADA, D/O.-DO- & W/O.CHANDRASEKHAR, FIVE CENTS COLONY, LAYILA VILLAGE, POST BELTHANGADY.

16. MURALEEDHAR, S/O. -DO- RESIDING AT DOOR NO.40/6, 7TH CROSS, 3RD MAIN, CAMBRIDGE LAY OUT, ALSOOR POST, MANGALORE 8.

17. GIRIJA, W/O.V.KESHAVA ALIAS HARI, RESIDING NEAR SOMANATHESHWAR TEMPLE AND JUNIOR COLLEGE, KUTHIYAR POST, BELTHANGADY.

18. AMINA, D/O.ABOOBACKER AND W/O.KOTTODI HASSINAR, RESIDING AT POOCHAKKAT, KEEKAN VILLAGE.

19. T.RAJAGOPALAN, S/O.MATHUKARA KARUNAKARA PODUVAL, RESIDING AT KARIVELLUR AMSOM, DESOM, TALIPARAMBA TALUK, POST KARIVELLUR.

ADDL.RESPONDENTS 20 TO 22:

20. PRABHAKAR CHITTAR, RESIDING AT SREE MOOKAMBIKA, 5TH- B CROSS ROAD, KODIKAL, MANGALORE 6.

21. SAKUNTHALA, W/O.PANDURANGA.C.H., ANGANAWADI TEACHER, SARALABETTA, MANIPAL, UDUPPI DT.

(+)22. MOHAN.C. VYSA NAGAR HOUSING COLONY, 12 - B, BEHIND K.P.T., POST BIJAI, MANGALORE.

MANOHARA. C., VYAS NAGAR HOUSING COLONY, 12 - B, BEHIND K.P.T., POST BIJAI, MANGALORE.

(+)NAME OF ADDL.R22 IS CORRECTED AS '**MANOHARA. C.**' VIDE ORDER DATED 27.2.2007 ON IA NO.428/2007.

(*)ADDL.R20 TO R22 ARE IMPLEADED AS LEGAL REPRESENTATIVES OF DECEASED SECOND RESPONDENT VIDE ORDER DATED 30.9.2002 ON CMP 1443/2002.

ADDL.RESPONDENTS 23 TO 29:

23. BHAGEERATHI, W/O.H.VITTALA, R.K.SADAN, NEAR DURGA HIGH SCHOOL, HOSDRUG VILLAGE AND TALUK, POST KANHANGAD.

24. NITHYANANDINI, C/O.H.S.VIJAYAKUMAR, KARNATAKA BANK LTD., MAIN BRANCH, SHIMOGA, KARNATAKA.

25. NAYANA, C/O.H.S.JAYAPRAKASH, SONA LATHERS, NO.65, N.S.PALYA, BANNERGHATTA ROAD, BANGALORE 560 076.

26. NAMITHA, W/O.DINESH, OPP.RAMAKRISHNA SRAM, NEAR MANGALA DEVI TEMPLE, MANGALORE.

27. NAMOD, S/O.H.VITTALA, R.K.SADAN, NEAR DURGA HIGH SCHOOL, HOSDRUG VILLAGE, HOSDRUG TALUK, POST KANHANGAD.

28. NARESH, S/O.-DO- IN -DO- -DO-

29. RAJESH, S/O. -DO-, RESIDING IN -DO- -DO-

(**)ADDL.RESPONDENTS 23 TO 29 ARE IMPLEADED AS LEGAL REPRESENTATIVES OF DECEASED 4TH RESPONDENT VIDE ORDER DATED 9.7.2004 ON CMP 1476/2002.

ADDL.RESPONDENTS 30 AND 31:

30. DEEPAMALA D/O.LATE VARIJA, C/O.KALAVATHI, SESAR POOJARI COMPOUND, HOYIGE BAZAR, MANGALORE 575001.

31. DHARSHAN, S/O.-DO- IN -DO- -DO-

(***)ADDL.RESPONDENTS 30 & 31 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF DECEASED 6TH RESPONDENT VIDE ORDER DATED 6.3.2007 ON CMP NO.6165/2002.

R1, R4 TO R9 BY ADV. SRI.SURESH KUMAR KODOTH
R19 BY ADV. SRI.K.RAMACHANDRAN
ADDL.R20 & 21 BY ADV. SRI.HARISH R. MENON
SRI.R.SURAJ KUMAR

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 27/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR ,J.

C.M.A.No.52 of 1999

Dated, this the 27th day of September, 2007

JUDGMENT

Plaintiffs in O.S.No.129/1994 on the file of the Munsiff Court, Hosdurg are the appellants. This appeal is filed against an order of remand passed by the Subordinate Judge, Hosdurg by which it had set aside the decree and judgment passed by the trial court and remanded the case for fresh disposal with certain directions.

2. Plaintiffs filed the suit for partition. It was contended that suit properties originally belonged to State. Same was assigned to Ramakrishna. He was in possession of the same by constructing house and by effecting improvements. He died in the year 1961. On his death his right devolved upon his children viz. defendants 1 to 4, Vinayaka, Damodara and Narayana. Vinayaka, Damodara and Narayana died thereafter. 1/7th share of Vinayaka devolved upon defendants 5 to 11, 1/7th share of Damodara devolved upon plaintiffs and the 1/7th share of Narayana devolved upon defendants 12 to 17. It was averred that plaintiffs and defendants are co-owners and in joint possession. It was further averred that for and on behalf of all the parties 4th defendant was managing the properties.

3. Defendants 2 and 3 supported the plaintiffs. 4th defendant contended that the parties to the suit and late Ramakrishna were governed by Namboodiri law

and hence the female members were not entitled to get any share in the property of late Ramakrishna. It was contended that Ramakrishna died long prior to the commencement of Joint Family Abolition Act and hence his male children alone had inherited his right. It was contended that plaintiffs and defendants 4 to 17 alone were entitled to share. It was further contended that all the other parties had their own separate houses and hence the house in the suit property may be allotted to the 4th defendant. It was also contended that he along with his family members are residing in that house for more than 40 years. It was contended that he had made substantial improvements in the property and building. It was also contended that he was conducting Tulasi Pooja, Navarathri and Puthari every year by spending more than Rs.10,00/- every year.

4. Subsequently defendants 18 and 19 were impleaded. Plaint was amended. It was contended that the plaintiffs came to know that 4th defendant sold 14 cents from the suit property to the 18th defendant and that sale deed was not binding on the plaintiffs. It was contended that defendants 18 and 19 had not derived any right. 18th defendant filed written statements contending that the 4th defendant had executed a sale deed in respect of 14 cents of property comprised in Re-survey No.145/3 to him. It was contended that 4th defendant had every right to sell the property as he was holding power of attorney of other co-owners. It was contended that 18th defendant was a bona fide purchaser. 19th defendant also filed written statement contending 4th defendant sold the property to 18th defendant on

the strength of the power of attorney executed by other co-owners. It was also contended that 4th defendant was fully competent to alienate the property for and on behalf of other co-owners. It was further contended that 18th defendant subsequently assigned his right to 19th defendant on 1.8.1991. So the only dispute to be resolved in the suit was whether the sale deed executed by the 4th defendant in favour of 18th defendant which was subsequently assigned in favour of 19th defendant was valid. Trial court found that the contention of defendants 4, 18 and 19 that 4th defendant was competent to alienate the shares of others was not correct and hence the sale deed was not binding on other co-owners. Trial court further held that the plaintiffs can proceed with the suit claiming partition ignoring the claims put forward by the 19th defendant. Trial court passed a preliminary decree which reads as follows:

"a) The plaint schedule property shall be divided into 7 equal shares out of which the plaintiffs are jointly entitled to 1 share, defendants 1 to 4 are entitled to 1 share each, the defendants 5 to 11 are jointly entitled to 1 share and the defendants 12 to 17 are jointly entitled to 1 share.

b) The share of the plaintiffs, defendants 2 and 3 shall be allotted to them separately.

c) The shares of the defendant 1, 4, joint share of defendants 5 to 11 and joint share of defendants 12 to 17 shall be allotted to them only on payment of the requisite court fee.

d) The plaintiffs, defendants 1 to 3 and defendants 5 to 17 are entitled to get mesne profits in accordance with their share from the 4th defendant commencing from the date of suit i.e. From 5.4.1994 till delivery of their share.

e) The quantum of mesne profits shall be decided at the stage of final decree.

f) Any of the parties who have paid court fee can apply for passing final decree.

g) The cost of the suit shall come out of estate."

Challenging that decree and judgment the 19th defendant filed appeal as A.S.No.52/1996 before the Subordinate Judge's Court, Hosdurg. Lower appellate court took a view that the disputed power of attorney appeared to be more or less genuine. It was further held that the attesting witnesses of Exts.B1 and B2 should have been examined before the trial court either by 4th defendant or by the 19th defendant. Lower appellate court set aside the decree and judgment passed by the trial court and remanded the case for the purpose of giving an opportunity to the 19th defendant to examine the attestors of Exts.B1 and B2 and also to get the document examined by an expert. Liberty was given to the parties to amend the pleadings and to adduce additional evidence. Challenging that order of remand plaintiffs have filed this appeal.

5. Though no substantial questions of law were framed at the time of admission, in view of the subsequent pronouncement of the Supreme Court at the

time of hearing the following substantial questions of law were framed:

1. Whether the lower appellate court was justified in remanding the case for the purpose of filling up lacuna?

2. Whether the finding of the lower appellate court that the parties shall be given an opportunity to amend the pleadings is correct?

Appellants and respondents were heard on the questions of law framed.

6. Suit was filed in the year 1994. It was decided on 29.6.1996. 4th defendant in the original written statement did not make any admission that he sold 14 cents of property to 18th defendant. Subsequently the plaintiffs amended the plaint and impleaded 18th and 19th defendants on the ground that 18th defendant had purchased properties from the 4th defendant and the same was subsequently sold to 19th defendant. Even according to defendants 18 and 19 the 4th defendant executed Ext.B3 sale deed in favour of 18th defendant on 17.12.1987 based on Exts.B1 and B2 power of attorneys. 4th defendant gave evidence. Trial court after elaborately considering the evidence of DW1 and also comparing Exts.B1 and B2 and also the oral evidence of DW3 held that Exts.B1 and B2 were brought into existence by Sivanandan and 4th defendant to create evidence. That finding of fact is based on good evidence. Neither the 4th defendant nor the 18th defendant gave any explanation why they did not examine the attestors to Exts.B1 and B2 power of attorneys or send the above documents for expert opinion. Summons were issued to the attestors and they appeared before the court, but they were given up

and not examined. It is also to be noted that there was no prayer to admit additional evidence by the appellants before the lower appellate court. No petition was filed before the lower appellate court to send the disputed documents for expert opinion. Further 19th defendant had no grievance that he was not given sufficient opportunity to adduce evidence. The trial court had given very cogent reasons. It discussed the evidence in detail and held that the power of attorneys were not genuine. The lower court without discussing the evidence set aside a finding which was based on well considered reasons. So the order of remand passed by the lower appellate court giving another opportunity to the 19th defendant who deliberately gave up the witnesses who appeared before the court to examine them again is nothing but an abuse of process of court. The 19th defendant cannot be allowed to fill up a lacuna. The oral evidence of DWs 1 to 3 clearly establishes that Exts.B1 and B2 were not genuine and valid documents. So on the strength of Exts.B1 and B2 the 4th defendant is not competent to convey the right of other co-owners to other person. The evidence on record shows that the parties are co-owners. The sale deed so far as it relates to the extent of share of 4th defendant is a valid document. Trial court was not justified in holding that the entire document is void or invalid. 19th defendant will get whatever share due to the 4th defendant. But he can only claim 1/7th share due to the 4th defendant which has to be worked out in the final decree proceedings.

In the result, Civil Miscellaneous Appeal is disposed of in the following

manner. The order of remand passed by the lower appellate court is hereby set aside. The decree and judgment passed by the trial court are restored but modified. In addition to clauses (a) to (g) in the decreetal portion the following clauses will also be added : " (h) 1/7th share due to the 4th defendant shall be allotted to the share of 19th defendant and (i) Equities and reservations shall be worked out during the final decree stage".

C.M.P.No.3203/1999 will stand dismissed.

K. PADMANABHAN NAIR,
JUDGE.

Appeal is posted for 'to be spoken to' today. Learned counsel appearing for the 19th defendant submits that the property was sold to him representing that the 4th defendant was having authority to deal with the properties of other co-owners and thereby cheated him. It is submitted that his right to proceed against the 4th defendant may be reserved. I make it clear that this judgment will not be a bar for the 19th defendant to proceed against the 4th defendant in accordance with law.

16th October, 2007. K.PADMANABHAN NAIR,
JUDGE

cks

K.PADMANABHAN NAIR, J.

C.M.A.No.52 of 1999

JUDGMENT

27th September, 2007.